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IN THE

# Supreme Court of the United States

October Term, 1985

WILLIAM H. HUDNUT, III, Mayor of the City of Indianapolis, Indiana, et al.,

*Appellants*

vs.

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al.,

*Appellees*

## ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## REPLY TO APPELLEES' MOTION TO AFFIRM OR DISMISS

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## I. Appellees and the lower courts ignore the harm of pornography and with it the constitutionality of the Ordinance.

Pornography, as defined in this Ordinance, serves none of the purposes for which speech is protected. (Brief of Defendants-Appellants at 12-22) In justifying the Ordinance under First Amendment standards, Indianapolis has never conceded that pornography is protected speech. "[T]o say the ordinance presents a First Amendment *issue* is not necessarily to say it constitutes a First Amendment *violation.*" *Los Angeles v. Taxpayers for Vincent*, 104 S.Ct. 2118, 2128 (1984). Only the discredited absolutist approach, *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 570 (1976), which appellees implicitly seek to advance through this litigation, holds to the contrary.

Based on knowledge that was previously unavailable, the Ordinance responds to a social problem that has defied effective solution. Both courts that have ruled on this ordinance have explicitly accepted its record of harm; appellees appear to have abandoned their prior attempts to deny it. They do argue that obscenity law solves whatever valid problem the Ordinance addresses. (Appellees' Motion to Affirm or Dismiss at 17) It is inconsistent to argue, as appellees do, both that pornography, as defined, is protected speech and also that it overlaps obscenity law. To the degree the two develop — as in theory the parties agree they do — to that degree the Ordinance is unquestionably constitutional without need for further justification.

In reality, however, obscenity law exists, and so does pornography, with its attendant abuses of persons. Indianapolis has seen the pornography industry double its gross in the past ten years under the aegis of the social protection ostensibly provided by the obscenity prohibition. Organized crime has dominated it more and more. Designed to circumvent obscenity law, pornography has

become increasingly violent, requiring more violence to make it and producing more acts of violence in some who consume it. The harms of its production and use to women and children, in particular, have become visible as never before. Indianapolis seeks to provide the supplemental remedy of civil actions by victims who can prove harm. Accepting the harm on the record but refusing to allow its victims access to court, the lower courts and appellees have in effect determined that they are expendable.

Appellees erase the concrete abuses they do not contest from their First Amendment discussion. As a result, they never confront the theory of this ordinance. This ordinance has never once been defended on grounds of pornography's "offensiveness," yet appellees argue that this is its underlying impulse. Review the causes of action one at a time. Victims of coercion into pornography, for example, can sue for the coercion itself and to remove its products from the market under §16-3(5). Pornography produced by coercion is the product of the forcible exploitation of a human being, a violation that is enhanced with every showing: "virtually every time some one watches that film, they are watching me being raped." (Testimony of L. Marchiano, coerced performer, Brief of Defendants-Appellants, Exhibit U.) Coercion is made actionable to rectify this, not because watching a woman being raped is "deemed offensive to one segment of society." (Appellees' Motion at 22) The severability clause specifically provides that "It is further declared to be the intent of the City-County Council that the ordinance be upheld as applied to the graphic depiction of actual sexual subordination whether or not upheld as applied to material produced without the participation of human subjects . . ." (Appendix E at E-34) It cannot be true that a woman can be strung from the rafters and if a sex picture is made of it, it is protected speech. But so long as the market for

these materials is permitted to exist, the incentive for such coercion remains.[1]

Appellees and the Court of Appeals thus distort but do not answer a *question* asked by one author of this ordinance: "if a woman is subjected, why should it matter that the work has other value?" (Appellees' Motion at 17) This query does no more than echo *New York v. Ferber*, 458 U.S. 747 (1982), by suggesting that human beings matter above materials made using them. Appellees and the Seventh Circuit in effect take the position that if a work has value, it does not matter if a woman is coerced. Indianapolis respectfully disagrees.

## II. The Ordinance is not unconstitutionally vague.

Contrary to appellees (Appellees' Motion at 6), the Court of Appeals did not even see fit to rule on the issue of vagueness, so appellants did not brief it here. (*See* Brief of Defendants-Appellants at 32-54.) On the basis of the contrived ignorance of self-serving uncross-examined affidavits, appellees indiscriminately intermingle due process vagueness with functional overbreadth, applying the doctrine of neither. Applying the law of vagueness instead of individualized notions of clarity which derive from personal experience or value judgments, the Ordinance is not legally vague.

A law is impermissibly vague if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Con-*

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[1] The *need* for a law is a legislative judgment, not a constitutional one. Lynching was already murder, but before 42 U.S.C. § 1985 (3), the Ku Klux Klan was addressed almost as effectually as the empire of the pornographers is now. Like the pornographers, the Klan was already illegal and practiced concerted terrorism by targeting victims by a group characteristic determined by birth. The profit motive has made the pornography industry further impervious to prior regulation.

*struction Company*, 269 U.S. 385, 391 (1925). Because "few words possess the precision of mathematical symbols . . . no more than a reasonable degree of certainty can be demanded." *Boyce Motor Lines v. U.S.*, 342 U.S. 337, 340 (1952). The requirement of reasonable certainty permits "the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding . . ." *Id.* at 340-41. All of the terms appellees challenge have either a technical, special, or commonly understood meaning, or are further defined or given a standard for usage by the Ordinance. *Connally*, 269 U.S. at 391-92.

"Pornography" becomes a legal term of art for the first time by the definition in this ordinance. A definition is an acceptable way to avoid the pitfalls of vagueness. *Id.* The objectivity and concreteness of the definition is revealed by comparing it with "obscenity," *Miller v. California*, 413 U.S. 15 (1973), one of several legal prohibitions on subsets of sexually explicit materials which are not unconstitutionally vague. Obscenity must violate "contemporary community standards," a standard infinitely elastic by design. Obscenity depends upon a viewer's subjective determination of whether the material appeals to the "prurient interest" in sex. Equally subjective is the term "patently offensive." Offensiveness *is* the harm obscenity identifies.

"Pornography," by contrast, is objective. Acts of coercion, force, assault, or trafficking must occur. The definition identifies the concrete harm of this medium: "pornography *is* the graphic sexually explicit subordination of women . . ." The harm of pornography is the civil inequality of the sexes, not of bad taste. "Sexually explicit" identifies an external feature of the materials, not an internal response to them. The six specific scenarios which must also be present, §16-3(q)(1)-(6), are descriptive and concrete, not conceptual and speculative.

Appellees challenge "sexually explicit" and "subordination" with particular venom. Their strategy is to present each term in a statutory vacuum, when by construction all elements must be present. Only if material is sexually explicit would any other element come into question. Only if one of the six scenarios is present — e.g., women enjoying rape, being tortured, penetrated by an animal, etc. — would a question of subordination arise. Contrary to appellees (Appellees' Motion at 19), materials that exclusively fall under §16-3(q)(6) are *exempt* from a trafficking claim. Vagueness concerns could arise there only if, for example, a woman sued for *coercion* into materials in which she was presented "in postures of servility, submission or display." A woman can not be coerced into *The Witches of Eastwick*.

The trafficking provision covers only a particularly violent subset of sexually explicit materials. "Sexually explicit" has a meaning which is commonly understood in dictionaries, in popular usage, and in law, where it approaches being a term of art. In WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (4th ed. 1976) ("WEBSTER'S"), "sexually" means "with regard to or by means of sex." *Id.* at 2082. Sex, hence the sexual, is within the average adult's experience. "Explicit" is "characterized by full clear expression: *being without vagueness* or ambiguity: leaving nothing implied." *Id.* at 801 (emphasis added). Sex that is explicit is by definition not vague. "Graphic" underlines how unambiguously sexually explicit the materials must be.

Courts know what "sexually explicit" means. They routinely use it to clarify other terms, *e.g.*, *John Hancock Mutual Life Insurance Co. v. Dutton*, 585 F.2d 1289, 1295 (5th Cir. 1978); *Young v. Abrams*, 698 F.2d 131, 136 (2d Cir. 1983). *See also Miller v. California*, 413 U.S. 15 (1973); *Pepperling v. Crist*, 678 F.2d 787 (9th Cir. 1982). In *Young v. American Mini-Theatres*, 427 U.S. 50 (1976), the term

designated a category of materials presumptively entitled to less constitutional protection. Courts considering this ruling use the term without trouble. *See, e.g., Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 831 n. 13, 834 (4th Cir. 1979); *Avalon Cinema v. Reed Thompson*, 658 F.2d 555 (8th Cir. 1981). This Court used it in *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1975), to clarify that a nudity prohibition was overbroad that was not limited to "sexually explicit" nudity. *Id.* at 213. For constitutional purposes, sexually explicit thus cannot mean mere nudity.

Most of the examples appellees and the lower courts list as covered by this ordinance are frankly ludicrous. They are not even marginally sexually explicit under existing law. Those which are, typically are only in "isolated passages or parts," §16-3 (4)(c), *which cannot ground a trafficking claim.*[2]. The pornographers, intervenors in the District Court, know the difference: "None of the plaintiffs identified in the complaint of American Booksellers Associations, Inc., and others alleges that it sells or exhibits materials dealing with sex, much less specializes in the sale or exhibition of such materials as do intervenors." (I.S.S.I. Theatre, Inc., Motion to Intervene as Plaintiffs at 2)

Sexually explicit materials must also be graphic, contain one of the listed scenarios, and subordinate on the basis of sex. Courts have upheld statutory terms which have well-settled common meanings or are given a stan-

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2 A passage from Professor MacKinnon's Brief of Linda Marchiano *Amicus Curiae* at 31-32 is almost unethically misquoted and distorted by appellees. (Appellees' Motion at 13) Her examples merely illustrate sadomasochism, which is *part of* most existing definitions of the sexually explicit. *See* 18 U.S.C. § 2255(2)(d), held not vague in *U.S. v. Fogerty*, 663 F.2d 928, 936 (9th Cir. 1981); N.Y. Penal Law §263.3, upheld by *New York v. Ferber*, 458 U.S. 747 (1982); Fla. Stat. 847.01 (2)(a)(ii), held not vague in *Griffin v. State of Florida*, 396 S. Rptr. 2d. 152, 154 (Fla. 1981); Ind. Code § 35-42-4-4(a) (West's Supp. 1985).

dard of usage by the text of the law. *Connally*, 269 U.S. at 391-92. "Subordination" satisfies both. "Subordination" is commonly the act, quality, or arrangement of "making secondary or subject" as in "inferiority of rank or dignity" or as in "a position of inferior status." WEBSTER'S at 2277.

Inferiority of rank or status is commonly experienced and understood. To be a subordinate in a hierarchy such as teacher/student, employer/employee or parent/child is the opposite of being an equal. The point of sex equality law is that man/woman not be such a hierarchy. Acts of subordination enforce second class status. By requiring that material which subordinates women also include women being *sexually abused*, the numbered scenarios provide a standard for usage of the term. That which subordinates, as opposed to merely expressing an idea about subordination, is a factual judgment, requiring an ability to distinguish, for example, between materials like the text of the ordinance itself, which describes pornography in graphic detail, and the pornography it describes. The need for some judgment does not make a law legally vague. The jurisprudence against group-based discrimination, of which the Ordinance is a part, sets itself against "the stigma of inferiority and second class citizenship." *Sa'iler Inn v. Kirby*, 5 Cal.3d 1,19, 485 P.2d 529, 540 (1971). This legal context further circumscribes "subordination" by placing it in a setting of understood violations of human rights.

The Ordinance describes in simple words a body of material which is not all vague in the world. Pornography is produced by an industry which knows what to put in it. It is sold largely through identifiable outlets to customers who know where to go and what they want. Any real case would test this law's adequacy at delineating this very distinct social phenomenon.

## III. Appellees state no Article III "case or controversy."

Appellees rely upon "facial" overbreadth, *Secretary of State of Maryland v. Munson*, 104 S.Ct. 2839 (1984), for access to court. The doctrine is inapt. In *Munson*, "[t]he first element of the standing requirement that Munson must satisfy . . . is the 'case or controversy' requirement . . ." 104 S.Ct. at 2846. Because the Secretary of State had told Munson it would be prosecuted if it failed to comply with the statute in question, "Munson suffered both threatened and actual injury as a result of the statute." *Id.* The Court then held that Munson could *also* challenge the statute facially for overbreadth on behalf of third parties. This "facial overbreadth" exception, whether viewed as a prudential rule of constitutional practice as in *Munson*, 104 S.Ct. at 2846-48, or as a technical rule of First Amendment standing as in *Regan v. Time*, 104 S.Ct. 3262, 3268 n.8 (1984), does not abrogate the rule that the *original* party must *first* show actual or threatened injury.

Thus appellees' assertion that standing is relaxed in First Amendment cases (Appellees' Motion at 24) is true only for raising third party interests by parties who have otherwise stated a cognizeable injury. Appellees' assertions that the Ordinance bans First Amendment protected materials are no more than legal conclusions which do not rise to the level of a showing of objective and personal, actual or immediately threatened harm. Their attack on this entire statutory scheme in the absence of any real injury has also led the lower courts into otherwise unthinkable errors of construction and application which the doctrines of standing and abstention are both designed to avoid.

## IV. Conclusion

Three divergent theories of this ordinance's invalidity have arisen in this litigation. The trial court essentially found the Ordinance did not fit into existing exceptions to the First Amendment. The Court of Appeals found that the free market of ideas requires freedom of pornography because it is a vehicle for a viewpoint, no matter what harm is done. Appellees maintain prominently here that it is vague and implicitly that it is overbroad. The Court of Appeals affirmed the District Court but adopted none of its approach. Appellees would similarly leave the Court of Appeals decision standing but urge virtually none of its reasoning. This suggests that the supposed invalidity of the Ordinance follows from no clear theory. It more than suggests that there is a substantial federal question in this case. If appellees' view is appealing, summary affirmance is hardly the vehicle to advance it.

Neither appellees nor the lower courts acknowledge the city's affirmative First Amendment argument, *see C.B.S., Inc. v. F.C.C.*, 453 U.S. 367, 396 (1981); *F.C.C. v. League of Women Voters*, 104 S.Ct. 3106, 3117 (1984), that making pornographers responsible for damage they do would enhance access to speech for those whom pornography has silenced. In the view of Indianapolis, it disagraces the Constitution to hold that one group must suffer — must forfeit its dignity, its honor, its security, its civil equality — to guarantee another group its pleasure, profits, and freedom to use them. It makes it no better that the industry which practices this abuse is an industry of pictures and words.